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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LARRY WHISTLER a/k/a LARRY ZBYSZKO a/k/a THE LIVING LEGEND, an individual, Plaintiff, v. WORLD WRESTLING FEDERATION ENTERTAINMENT, INC., a Connecticut Corporation, Defendant.	Civil Action No. 1-02-CV-1008-CC

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE IN OPPOSITION TO MOTION FOR A 30-DAY STAY OF PROCEEDINGS

Plaintiff Larry Whistler ("Plaintiff") files this reply to Defendant World Wrestling Federation Entertainment, Inc.'s ("Defendant" or "WWE") response in opposition to Plaintiff's motion for a 30-day stay of proceedings (the "Motion to Stay").

To support its opposition to Plaintiff's Motion to Stay, Defendant relies upon recent Eleventh Circuit cases, namely the Eleventh Circuit's rulings in Barger v. City of Cartersville, Ga., 348 F.3d 1289 (11th Cir. 2003); Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1284 (11th Cir. 2002); and

67

De Leon v. Comcar Industries, Inc., 321 F.3d 1289 (11th Cir. 2003). As more fully described below, the facts and circumstances of this case are distinguishable from the decisions cited by Defendant. More specifically, unlike the bankruptcy debtors in the above-referenced cases, there is no evidence that Plaintiff Whistler intended to make a mockery of the judicial system.

As noted in Barger, the applicability of judicial estoppel largely turns on two factors. First, a party's allegedly inconsistent positions must have been "made under oath in a prior proceeding." Barger, 348 F.3d at 1293-94 (*citing* Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1284 (11th Cir. 2002)). Second, the "inconsistencies must be shown to have been *calculated* to make a mockery of the judicial system." Id. (Emphasis added, citations omitted). In Barger, the Court found that Barger's inconsistent statements to the Court were calculated. Id. at 1296 ("it seems clear that Barger deceived the trustee"). More specifically, when the bankruptcy trustee asked Barger for the monetary value of her discrimination suit, she *informed him* that she was only seeking equitable relief. Barger did not tell the trustee that she was seeking backpay, liquidated damages, compensatory

damages, and punitive damages. Unlike the debtor in Barger, and the other decisions cited by Defendants, Plaintiff Whistler's inconsistencies were not calculated to make a mockery of the judicial system, rather his omissions were the result of simple error and inadvertence. See id. (noting that for purposes of judicial estoppel, "intent is a purposeful contradiction – not simple error or inadvertence.").

In late January to early February of 2002, a couple of months before filing this lawsuit, Plaintiff Whistler hired David L. Miller, Esq. to assist him with his Chapter 13 bankruptcy filing. Approximately nine months after bringing suit, Plaintiff Whistler requested Mr. Miller to convert his Chapter 13 filing to a Chapter 7 bankruptcy filing. Unfortunately, and unbeknownst to Plaintiff, Mr. Miller merely took Plaintiff Whistler's personal information from the Chapter 13 bankruptcy filing and transferred said information onto the Chapter 7 bankruptcy forms. This simple oversight was a clerical error that certainly does not rise to the level of a calculated inconsistency meant to make a "mockery of the judicial system." Moreover, Plaintiff Whistler informed Mr. Miller of the present litigation and therefore it was

reasonable for Plaintiff Whistler to rely on his bankruptcy attorney to prepare his Chapter 7 bankruptcy documents.

Plaintiff further asserts that, unlike the cases cited by Defendant, it would be a mockery of the judicial system to impose judicial estoppel on Plaintiff under these circumstances. If Plaintiff were estopped from bringing claims for monetary relief, the Court would be punishing Plaintiff and Plaintiff's creditors for a simple inadvertent mistake made in an unrelated court proceeding, and rewarding Defendant for its blatant and willful acts of trademark infringement.

Justice would not be served by imposing judicial estoppel on Plaintiff Whistler and Plaintiff Whistler's creditors; the only party to benefit would be the tortfeasor. Recently, the Supreme Court observed that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." New Hampshire v. Maine, 532 U.S. 742, 750, 121 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001) ("Judicial estoppel is an equitable doctrine invoked at a court's discretion.") Nevertheless, the Supreme Court stated that a factor to consider in determining whether to apply the doctrine in a particular case is whether

the party advancing the inconsistent position would derive an unfair advantage on the opposing party. Id.

In this case, none of the parties were prejudiced by Plaintiff's mistake. As soon as Plaintiff became aware of the undisclosed claims, he filed a motion to reopen the bankruptcy proceeding to correct his disclosures and include the present lawsuit. If the bankruptcy court finds that Plaintiff's omissions were calculated, it has the power to modify its earlier findings. It would be completely inequitable to apply the discretionary doctrine of judicial estoppel to Plaintiff Whistler and the bankruptcy trustee, because Mr. Miller's omission occurred without knowledge or fault of Plaintiff Whistler and the bankruptcy trustee. See In re Haskett, 297 BR 637 (N.D. Ala. 2003) (Bank) (citing Burnes, the Court noted that "Burnes' 'motive to conceal' is none other than 'interest of creditors' harmed by a dash of bad faith. The true hook is whether a debtor's failure to disclose had any effect on the outcome of the case."). Furthermore, Defendant would avoid paying the consequences of its wrongful acts by pointing out a simple error in a court proceeding that is entirely unrelated to its acts of willful trademark infringement.

For all the foregoing reasons, and the reasons set forth in Plaintiff's Memorandum of Law in Support of Motion for a 30-day Stay, and Plaintiff's Response and Memorandum of Law in Opposition to Motion for Summary Judgment on the Basis of Judicial Estoppel, Plaintiff's Motion to Stay should be GRANTED in all respects by this Court.

Respectfully submitted this 7th day of May, 2004.

By: _____

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CERTIFICATION

Pursuant to Local Rule 7.1D, counsel for Plaintiff hereby certifies that this Memorandum has been prepared with Courier New Font (12 point).

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CERTIFICATE OF SERVICE

A copy of the PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE IN OPPOSITION TO MOTION FOR A 30-DAY STAY OF PROCEEDINGS was served by U.S. First Class Mail upon the following:

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This 7th day of May, 2004.

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